United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

76-1438

To be argued by
T. GORMAN REILLY

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1438

UNITED STATES OF AMERICA,
Appellee,

—v.—

JAMES MELVIN GREEN,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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Preliminary Statement

James Melvin Green appeals from a judgment of conviction entered on September 14, 1976, in the United States District Court for the Southern District of New York, after a three day trial before the Honorable Robert J. Ward, United States District Judge, and a jury.

Superseding Indictment S. 76 Cr. 517 charged James Green and his wife, Debra Fennell Green, in five counts, with bank robbery and attempted bank robbery in violation of Title 18, United States Code, Section 2113(a), and with using a dangerous weapon during the course of a bank robbery or attempted bank robbery in violation of Title 18, United States Code, Section 2113(d).

The trial commenced on June 16, 1976 and concluded on June 18, 1976, when the jury found the defendant

James Green guilty on all five counts. The jury found the defendant Debra Green guilty on Counts 3, 4 and 5 but had not yet reached a verdict as to Mrs. Green on Counts 1 and 2 when the court declared a mistrial as to those two counts.

On September 14, 1976, Green * was sentenced to concurrent terms of twenty years imprisonment on Counts 1, 3 and 4, the Section 2113(a) counts. As to Counts 2 and 5, the Section 2113(d) counts, the imposition of sentence was suspended and the defendant was placed on probation for concurrent one day terms, consecutive to the twenty year period of incarceration.**

Green has been in custody since the date of his arrest, March 12, 1976.***

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* Hereafter, the name "Green" appearing alone refers to James Melvin Green.

** Debra Green was sentenced as a youthful offender under Title 18, United States Code, Section 5010(b) on Counts 3 and 4. Imposition of sentence was suspended on Count 5 and she was placed on probation for a period of 1 day following her release from confinement. Counts 1 and 2 were dismissed on consent of the Government. Debra Green has not appealed from the judgment of conviction.

*** On September 7, 1976, Green pleaded guilty in the District of New Jersey to three counts of bank robbery in violation of Title 18, United States Code, Section 2113(a). On October 15, 1976 he was sentenced to a term of twenty years on each count, concurrent with each other and with the sentence earlier imposed in the Southern District of New York in the instant case. No appeal was taken from that guilty plea.

Statement of Facts

The Government presented evidence to show that in early 1976 Mr. and Mrs. Green, acting as a team participated in one bank robbery and two attempted bank robberies in mid-town Manhattan within the course of 13 days. The Government called eight witnesses and introduced seven exhibits in evidence.

A. Counts 1 and 2—The February 25, 1976 Attempted Robbery of the Manufacturers Hanover Trust Company

On February 25, 1976 shortly after 11:30 in the morning there was an attempted robbery at a branch of the Manufacturers Hanover Trust Company, located at 1185 Avenue of the Americas on West 47th Street. Three bank employees testified.

Charlene Churilla, the victim teller, related that during a relatively slow period on that day, two people—a man and a woman—appeared at her station. (App. 450-51). The woman presented a demand note which read. "We have a gun. Give us fifties and twenties". (App. 450). Rather than comply Miss Churilla closed her cash drawer and attempted to engage the holdup team in conversation. She clearly observed that the male member of the team was holding a gun which he proceeded to place on the counter. The gun was aimed at Miss Churilla. (App. 450-51). At an opportune moment, some three minutes after first seeing the holdup team, Miss Churilla ducked down below the counter. When she got up again the man and woman had left. (App. 451). Miss Churilla identified Mr. and Mrs. Green as the two people who had attempted the bank robbery. (App. 453).

A second bank employee, Celinda Rivera, noticed the holdup team when she turned to answer the phone. After seeing Miss Churilla crouched on the floor, she looked up and saw the man and woman at the counter. (App. 497). The male was pounding the top of the counter, yelling: "Come on, come on." (App. 489). She stood still, staring at him from a distance of about six feet behind Miss Churilla's teller station. (App. 499, 502). Finally after "a matter of minutes" the two assailants both walked out of the bank. Miss Rivera identified James Green and Debra Green as the two persons who attempted to rob the bank. (App. 499-500).

Gene White, a management trainee, was working as a teller at the West 47th Street branch on February 25, 1976. He occupied the teller's station next to Miss Churilla when the attempted robbery took place. (App. 547-48). Because he had no customers, White had the opportunity to glance around the bank. His attention was caught by what appeared to be an exchange over a check between Miss Churilla and a female customer. Instead of handing the item over to the teller, the woman was just standing there holding on to it. It was then that he noticed that next to the woman there was a man holding a gun on the counter. The gun was pointing along the counter directly at White who was some 10 to 15 feet away. (App. 548-50). White positively identified Green as the man who was holding the gun. (App. 550). He stated that he did not get a good view of the woman because she was not facing in his direction. (App. 550).

Churilla, Rivera and White each testified that she or he pushed the alarm after observing the holdup team. (App. 450, 499, 549). As a result, the bank surveillance camera system was activiated and a reel of film was exposed. (App. 454). Two photographs from the reel of

film were introduced in evidence. (GX 2, 3). Miss Churilla testified that these pictures accurately portrayed the male and female who attempted to hold her up on February 25th. (App. 454-55). By comparison of the photographs with the defendants before them, the jury could easily conclude that it was Mr. and Mrs. Green who were pictured in the photographs.

B. Count 3—The March 5, 1976 Attempted Robbery of the First National City Bank

Miss Lilly Yu was the only eyewitness to the attempted bank robbery of the First National City Bank at 40 West 57th Street on March 5, 1976. It was about 2:00 in the afternoon when a young black couple stepped up to her window. The young woman showed a note, announcing: "This is a stick-up." When Miss Yu reached to push the alarm, the young couple panicked and left the bank. (App. 428).

Miss Yu stated that she did not observe the man and woman long enough to be able to identify them. (App. 429). However, she did describe the female as young, about 20 years of age, around 110 pounds, black, and about 5'3" to 5'5". (App. 444-45). She described the male as black, young, around 20, same height as the woman, 5'3" to 5'5", about 130 pounds, with a short hair cut. (App. 445-46).

Because Miss Yu hit the alarm, the bank surveillance cameras were activated and two reels of film were exposed. (App. 442, 433-34). William Credell, Jr., a camera technician employed by the Holmes Protection Company, was sent to the bank on the afternoon of March 5, 1976 in response to the alarm. (App. 572-73). Credell confirmed that hitting the alarm has the effect of starting

the surveillance cameras to roll. (App. 575). He unloaded the two rolls of film from the surveillance cameras which he then delivered to the Federal Bureau of Investigation to be developed. (App. 573-74). The two rolls of film were received in evidence. (GX 4, 5). FBI Special Agent Edward Higgins testified that he reviewed the two reels of film after they had been developed by the FBI photo lab. He then had positives made of several frames, one of which was received in evidence. (App. 590-591, 607, 772; GX 1-A).

By comparison of GX 1-A and the two reels of film (GX 4, 5) with the defendants who were before them the jury could easily conclude that Mr. and Mrs. Green were the young black couple pictured heading toward the door of the bank shortly after Miss Yu hit the alarm.

C. Count 4 and 5—The March 8, 1976 Robbery of the National Bank of North America

On March 8, 1976, Donna Morrison was employed as a teller at a branch of the National Bank of North America located at 515 Seventh Avenue near 38th Street. (App. 556). It was about 11:45 a.m. when she returned from lunch and opened up her station. Her first customers were two black people, one female, one male. The woman held up a note which read: "This is a stickup. Give us all your money. We have a gun".

The black male gave meaning to this message by pulling out a gun from the inside of his coat and holding it in his right hand. Miss Morrison complied by handing over $1400 from her top drawer. The holdup team then left the bank. (App. 557-59).

Because Miss Morrison failed to hit the alarm properly, the bank surveillance camera was not set off. (App.

564). Miss Morrison estimated that the black couple was at her counter for about two minutes. She identified, without hesitation, Mr. and Mrs. Green as the holdup team. (App. 559-60).

D. The March 12, 1976 Arrest of the Two Defendants

On March 12, 1976 at about 2:40 p.m., Detective Nora Palmer of the New York City Police Department was parked in an unmarked car on Broadway between 53rd and 54th Streets on surveillance. It was then that she observed James Green and Debra Green together, walking north on Broadway. (App. 616-18). She and her partner stepped out of the vehicle and placed the Greens under arrest.

James Green was found to be carrying a handgun in his pants; it was partially loaded with three rounds of ammunition. (App. 620-21). When the couple was taken to a nearby police station, Mrs. Green was asked to empty the contents of her handbag. Detective Palmer found a Chemical Bank savings account withdrawal slip, bearing the following hand printed message: "This is a stick up we have guns I went (sic) all the money don't push no button". (App. 622-23; GX 7).

The court allowed the holdup note to be received in evidence as to Mrs. Green only. (App. 641-42; GX 7). It allowed the gun, the holster, and the three bullets to be received as to Green only. (App. 651; GX 8, 8-A, 8-B).

The Defense Case

The defendants did not present any evidence.

POINT I

The District Court Properly Received In Evidence The Gun, Holster And Bullets.

The District Court allowed the receipt in evidence of a handgun, its holster and three bullets which were taken from Green at the time of his arrest. Relying exclusively on *United States* v. *Robinson*, Dkt. No. 76-1153, slip op. 5913 (2d Cir., Nov. 1, 1976) (2-1), *petition for rehearing and suggestion for rehearing en banc* pending, the defendant claims that the District Court abused its discretion in allowing the evidence to be received against him, asserting that the probative weight of the exhibits was far outweighed by their prejudicial effect. This claim is without merit.

In *United States* v. *Robinson, supra*, the defendant was charged with armed robbery. One month after the robbery an accomplice was arrested and identified Robinson as one of the holdup men. At the time of Robinson's arrest, ten weeks after the robbery and while at work at the Gouverneur Hospital, Robinson was found in possession of a .38 caliber revolver. At trial none of the eight bank employees was able to identify Robinson as a participant in the robbery. Although the testimony of the accomplice witness supported the conclusion that Robinson had used a .38 caliber pistol during the bank robbery, the bank surveillance photographs did not show the man identified by the accomplice as Robinson having used a gun and the majority found that, after an examination of the photographs, Robinson's identity was "far from clear." *Id.* at 5916.

In addition, in a prior trial of Robinson, where the weapon had been excluded, the jury had been unable to reach a verdict. In the second trial, the jury deliberated

for two-and-one-half days and only arrived at a unanimous verdict after two *Allen* charges. Confronted with the unique circumstances of this "singular case," *id.* at 5914, this Court ruled that the trial judge had abused his discretion in permitting evidence of the weapon to be introduced.

The Government has filed for rehearing *en banc* in *Robinson*, since it is our view that *Robinson* represents a marked and insufficiently explained departure from a consistent line of authority in this Circuit which has approved the receipt of just such evidence. *United States* v. *Weiner*, 534 F.2d 15 (2d Cir. 1976); *United States* v. *Campanile*, 516 F.2d 288 (2d Cir. 1975); *United States* v. *Ravich*, 421 F.2d 1196 (2d Cir.) *cert. denied*, 400 U.S. 834 (1970); See also *United States* v. *Fisher*, 455 F.2d 1101 (2d Cir. 1972).* But, in any event,

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* In *United States* v. *Wiener*, a panel of this Court found no error in the introduction into evidence of a loaded gun, found at the time of defendant's arrest for a narcotics' violation. There was *no* evidence that the gun had been used in prior negotiations involved in the case. The panel, nevertheless, without any discussion of the kind of prejudicial effect the majority considered overwhelming in *Robinson*, found such evidence relevant since

> "substantial dealers in narcotics keep firearms on their premises as tools of the trade almost to the same extent as they keep scales, glassine bags, cutting equipment and other narcotics equipment." (534 F.2d at 18).

Accordingly, the Court found no abuse of discretion in admission of the gun on "the issues upon which Wiener was tried. . ." *Id.*

The result in *Wiener* is not, we submit, compatible with the reversal in *Robinson*.

Even more at odds with the majority's decision in *Robinson* is the decision of this Court in *United States* v. *Campanile*, *supra*. There, this Court affirmed a bank robbery conviction where evidence was introduced of the subsequent seizure of a Lugar pistol from the apartment of defendant's brother. The bank robbery in *Campanile* had been committed at night and *without the ap-*

[Footnote continued on following page]

Robinson is scant authority for overturning the District Court's discretionary ruling here.

The inherent reliability of the gun, holster and bullets as evidence of Green's participation in the three bank robberies charged in the indictment is underscored by defendant's arrest in the company of his female accomplice, the presence on her person of a demand note such as was used during the three holdups, the receipt in evidence of clear and certain surveillance photography im-

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parent use of any weapons at all. Again, this Court found no abuse of discretion since the evidence of the gun was probative of the defendant's intent. There was, we submit, substantially more relevance to introduction of the handgun evidence in *Robinson*, as well as the instant case, than in *Campanile*, and indeed that admission of the gun in *Robinson* and this case follows a *fortiori* from *Campanile*. See also, *United States* v. *Vosper*, 498 F.2d 433, 436 (5th Cir. 1974).

The majority in *Robinson* also failed to adequately distinguish *United States* v. *Ravich*, *supra*. In *Ravich*, a bank robbery case, the trial court admitted evidence that six .38 caliber guns were found at the time of defendants' arrest in a distant state, some six weeks after commission of the bank robbery. Other evidence demonstrated that in the commission of the robbery the perpetrators employed "three pistols and a sawed-off shotgun." On appeal, this Court found no abuse of discretion in receipt of six handguns and other ammunition found in the search at the time of arrest.

In ruling upon the evidentiary question, this Court noted:

> "The evidence connecting the guns seized in Louisiana with those used in the robbery *was rather attenuated*. Indeed, since only three guns were used in the robbery it is perfectly plain that at least half of the proffered weapons were not used there.
>
> * * * * *
>
> Nevertheless, a jury *could infer* from the possession of a large number of guns at the date of arrest that at least some of them had been possessed for a substantial period of time, and therefore that the defendants had possessed guns on and before the date of the robbery." (421 F.2d at 1204) (emphasis supplied).

plicating Green in two of the three bank robberies and the positive identification of Green by four of the five bank employees as the armed bank robber.

Moreover, Green was not arrested at work several months after an alleged bank robbery. He was accosted on the street during banking hours in the mid-town business area where the five bank robberies under investigation had taken place. The arrest took place on March 12, 1976, only four days after the successful holdup at the National Bank of North America, and therefore the inference that Green had also possessed the weapon at the time of the bank robberies was far stronger than in *Robinson.**

Further, although there was no testimony in the record specifying the type, caliber or brand of gun used in any of the bank robberies, it can not be said, as was the case in *Walker* v. *United States*, 490 F.2d 683 (8th Cir. 1974), relied upon by the *Robinson* majority, that the gun found on the defendant at the time of his arrest had nothing to do with the three bank robberies. Considering the fact that Green was walking arm in arm with Debra Green who had in her handbag a demand note of the same size and content as was used in the three bank robberies, the probability that Green's revolver (GX 8) had been used in the robberies was quite high. It has usually been deemed sufficient if the seized gun is shown to be "similar" to that used in the offense. *United States* v. *Cunningham*, 423 F.2d 1269, 1276 (4th Cir. 1970); but see *United States* v. *Robinson*, *supra* at 5924 n. 10. And even if the seized gun was dissimilar from

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* The majority in *Robinson* recognized that "[t]he strength of the inference from subsequent possession to prior possession can be judged only in the context of the facts of each case." Slip op. at 5922.

that used during the holdup, it was proof of access to the implements used in the crime and was therefore circumstantial evidence of Green's preparation and ability to commit the underlying offense. *United States* v. *Wiener, supra; United States* v. *Baker*, 419 F.2d 83 (2d Cir. 1969), *cert. denied*, 397 U.S. 976 (1970). *Cf. Moore* v. *Illinois*, 408 U.S. 786, 198-800 (1972); See also *United States* v. *Magnano*, Dkt. No. 76-1011, slip op. 5471, 5480-81 (2d Cir., Sept. 7, 1976).

The relevance and reliability of Greens' possession of a handgun was thus plainly greater than was the case in *Robinson*, and it can not fairly be said that any prejudice which might have flowed from the admission of the weapon "substantially outweighed" the probative value of the evidence. *United States* v. *Robinson, supra*, slip op. at 5925.*

It is also significant to note that here, unlike *Robinson*, the jury reached a verdict on all counts as to Green within the course of a single afternoon's deliberations and without being subjected to an *Allen* charge. Accordingly. Judge Ward did not abuse his wide discretion in admitting the weapon into evidence. See *United States* v. *Harvey*, 526 F.2d 529, 536 (2d Cir. 1975), *cert. denied*, 423 U.S. 830 (1976); *United States* v. *Ravich, supra*, 421 F.2d at 1204-05.

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* While it is true that unlike *Robinson*, no limiting instruction was given in this case (because none was requested) the *Robinson* Court noted that the limiting instruction given there had been "far too cryptic to dispel the prejudice. . . ." Slip op. at 5926. Thus, the absence of a limiting instruction here certainly did not add to any prejudice.

POINT II

The Use of Photographic Spreads Was Not Unnecessarily and Impermissibly Suggestive and Did Not Deny Green a Fair Trial.

Green contends that Judge Ward was incorrect in permitting any in-court identification of him by the Government's witnesses. More specifically, he claims that the in-court identifications of four bank employees were tainted by the prior use of unnecessarily and impermissibly suggestive photographic spreads and therefore should have been excluded. This familiar argument is without merit. None of the bank employees was influenced to identify the defendant through the use of a defective photographic display procedure. In any event the record establishes that at trial these witnesses had a vivid independent recollection of Green from the startling events themselves.

When confronted with this claim below, the District Court, after a lengthy hearing, denied the motion, making the following findings:

> "The Court finds that the Federal Bureau of Investigation showed photo spreads containing between six and nine photographs to various tellers employed by the banks which are alleged to have been robbed, in addition, showed certain surveillance photos to those tellers.
>
> Having examined the photographs, all of which were of black males and females, and having heard the testimony of the tellers, the Court finds that the photo spreads which were used by the Federal Bureau of Investigation's special agents were not suggestive.

> The Court finds that the identification procedure was not so suggestive as to give rise to a substantial likelihood of misidentification. Simmons versus United States, 390 U.S. 377, 385 (1968).
>
> The testimony of the tellers who identified the defendants indicated that they had approximately one to four minutes to observe the defendants at distances of from two to fifteen feet during daylight hours in well lighted banks, with the tellers having a strong motivation to remember the defendants, the tellers being the victims of the crimes and in several instances having testified to the Court that they had been instructed in their training to observe persons who were perpetrators of bank holdups." (App. 282-83).

At trial three employees of the Manufacturers Hanover Trust Company identified Green as the male member of the hold up team who appeared at the bank on February 25, 1976: Charlene Churilla, Celinda Rivera and Gene White. (Counts 1 and 2). Donna Morrison, a teller at the National Bank of North America, identified the defendant at trial as the man who took $1,400 from her bank on March 8, 1976. (Counts 4 and 5).*

FBI Special Agent Edward Roach showed the same spread of photographs to each of the three Manufacturers Hanover Trust Company employees on March 5, 1976 just nine days after the bank robbery. The spread consisted of front and side views of nine young, black males.

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* Lilly Yu, the victim teller at the First National City Bank on West 57th Street, was unable to make an in-court identification. (Count 3).

(App. 11-17, 775-76; GX H-1). The pictures are typical mug shots, of a uniform size, showing the subject's head and upper torso. Police data appears on seven of the nine photographs, including the photograph of Green. The complexion of the subjects pictured is in the medium to dark range. With but one exception—No. 3: Stanley Bailey—the hair of all subjects in the spread is closely cropped. In sum there is nothing distinctive about the photograph of Green that would have drawn attention to it or suggested him as the culprit.

On April 2, 1976, FBI Special Agent Paul F. Cavanagh showed a spread of six photographs of young, black males to Donna Morrison of the National Bank of North America. (App. 221-26, 781; GX H-20). In a matter of seconds she selected the photograph of Green. (App. 230-31). Again the photographs were mug shots, of a uniform size, showing front and side views of the subjects. Identifying police data was covered over with evidence tape on each of the photographs. Since Green had been arrested in the interim, a more current photograph, showing him with a mustache and a slight growth of hair on his chin, was available to be used in this spread. There was nothing distinctive about the arrest photograph of Green used by Special Agent Cavanagh.*

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* Green claims there was a conscious attempt to exclude anyone bearing a resemblance to him from the photographic spreads used by the FBI. As proof he points to the fact that in one instance, Robert Windram, an employee of the First National City Bank at Fifth Avenue and 28th Street which was robbed on February 25, 1976, selected two photographs of men resembling the assailant, one being Green, the other being Toby Raines. (App. 125-26, 777; GX H-10). This identification was made on February 26, 1976 before Green was arrested. On March 19, 1976, seven days after Green's arrest, FBI Special Agent Davis Russell returned to the bank and showed a new spread of photo-

[Footnote continued on following page]

Since Special Agents Roach and Cavanagh used spreads of photographs which were demonstrably fair and which in no way drew special attention to Green,* Green has

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graphs to Windram. This spread used the arrest photograph of Green, showing the defendant with a mustache and facial hair and appearing to be more mature than in his earlier photographs. (App. 120-23, 781; GX H-11). Significantly, this second spread did not use any of the photographs that appeared in the first spread shown to Windram. If the photograph of Toby Raines had been used in the second spread it might have led to a misidentification. For, Windram might well have recognized the Toby Raines photograph as the only repeat in the second spread.

It is worth noting that the Government did not charge the Windram bank robbery in the indictment nor even mention it at trial. The hearing record is barren of any suggestion that the various FBI agents who worked on the investigation assisted each other or consulted with each other in making up their respective spreads. There is certainly no basis for a conclusion that either Special Agent Roach or Special Agent Cavanagh took pains to exclude the Toby Rains photograph from their respective spreads because of the tentative identification made by Windram.

* The Government willingly joins Green in his invitation, (Defendant Br. 27), to have the Court examine the two photographic spreads in question, (App. 775-76, 781), and decide for itself whether they were in any way suggestive. We are confident that the Court will be impressed by how fair the two spreads appear to be as well as by the many points of similarity between Green and the other subjects.

We also join in inviting the Court to compare the two photographs of Green in the spreads (App. 775, 781) with the surveillance photographs introduced at trial (App. 772, 773, 774). Such a comparison compels a conclusion that James Green and the black male shown in the surveillance photographs are one and the same. Surely, the statement that "no one could reasonably conclude from these photographs, beyond a reasonable doubt, that Green is the man shown in the surveillance photographs" (Defendant Br. 28, fn.), is nothing more than the fond hope of a zealous advocate. In view of the fact that the arrest photograph of the defendant's wife (GX H5, H17, H19) appears identical to the woman shown in the surveillance photographs, counsel's statement seems all the more absurd.

been forced to press this Court to adopt a rule whereby the only permissible, non-suggestive photographic spread would be one in which the skull structure and facial features of all subjects are the same as those of the prime suspect. This totally unrealistic proposal ignores the difficulty of coming up with such a perfect match and imposes a burdensome and overly technical requirement on law enforcement investigations for which there is no cited authority. Indeed, this Court has already held that

> "there is no requirement that even in line-ups the accused must be surrounded by persons nearly identical in appearance, however desirable that may be." *United States* v. *Reid*, 517 F.2d 953, 965-66 n.15 (2d Cir. 1975).

If this be true with respect to lineups, then no higher standard should be applied to the showing of photographic spreads, a procedure which the Courts have held not to be a critical stage in the criminal process. *United States* v. *Fernandez*, 456 F.2d 638, 641 n.1 (2d Cir. 1972); *United States* v. *Fitzpatrick*, 437 F.2d 19, 25-26 (2d Cir. 1970); *United States* v. *Bennett*, 409 F.2d 888 (2d Cir.), *cert. denied sub nom. Haywood* v. *United States*, 396 U.S. 852 (1969).

Indeed, if after painstaking effort the FBI had been able to come up with six to nine photographs of persons almost identical to Green, the defendant would most likely be arguing that the in-court identifications by the eye witnesses were tainted by the procedure. For, the effect of showing photographs of subjects all having the same skull structure and facial features to witnesses whose memory is uncertain is to further define for them the identifying features of the defendant. Thus, if an eye-witness showed uncertainty or even picked out the wrong photograph from such a spread, at trial he or she would be in a position to identify the defendant without a moment's hesitation simply because the defendant would

be the only one in the courtroom resembling [illegible]ook-alikes in the photographs. The "ideal" spread, as Green contends it should be, would therefore be open to the justifiable criticism that it suggested to the witness what the Government believes the offender must have looked like.

Nor was there anything suggestive about the manner in which the two spreads of photographs were shown to the witnesses. According to the testimony of Special Agent Roach, barely discussed in defendant's brief on this point, he showed the photographs separately to each of the three Manufacturers Hanover Trust Company employees; the photographs were placed face up on a table; and the witnesses were asked if they could pick out anyone whom they felt was identical to the person that committed the attempted bank robbery. (App. 12-13, 16-17). The three witnesses generally confirmed that this is what was done.* (App. 51, 73, 112). Under the circumstances,

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*Charlene Churilla testified that Special Agent Roach told her "that he had a series of nine photographs that he wanted me to look at and that they weren't in any specific order. He was just going to lay them in front of me and he wanted me, to the best of my knowledge, to pick the man that I saw on the 25th of February." (App. 51).

Celinda Rivera recalled that the photographs were placed face down on the table and then turned over. In any event she did not remember any writing or other descriptive information appearing on the backs of the photographs. (App. 77-78, 95-97).

According to Gene White, the FBI agent met with him in the conference room of the bank and explained that "he would show me a series of photos and wanted me to identify the person whom I thought was the suspect. He did say the FBI had someone in mind, but, you know, he didn't elaborate on this. . ." App. 112). Even if this Court were to view the evidence in the light most favorable to the *defendant* by crediting White's account and rejecting Special Agent Roach's testimony on this point, there still would be no procedural defect of the degree condemned by the Supreme Court in *Simmons* v. *United States*, 390 U.S. 377, 384 (1968): "The chance of misidentification is also heightened if the police indicate to the witness that they have other evidence that one of the persons pictured committed the crime."

the FBI agent can hardly be faulted for making mention of the man who committed the bank robbery in connection with the showing of the photographs. This was the obvious purpose in showing the photographs to the three bank employees, and this procedure is a far cry from the biased instructions referred to in the article* attached to defendant's brief: "One of these men is a suspect . . .: it is important that you identify him for us." There was no attempt made to single out the photograph of the accused and ask specifically about him. See, e.g., *Myshologsky* v. *People of State of New York*, 535 F.2d 194, 197 (2d Cir. 1976). Similarly, there was nothing defective in the procedure followed by Special Agent Cavanagh in the showing of his photographic spread to Donna Morrison of the National Bank of North America. He showed her six photographs of black males and asked if she could pick out the individual who robbed her. (App. 229-31). Miss Morrison confirmed that this was how the photographs were presented to her. (App. 248, 252).

Although it is the Government's firm contention that the showing of the photographic spread was not suggestive, and certainly not unnecessarily or impermissibly so, the inquiry does not rest there. Due process is violated by an identification procedure, here the use of photographic displays, only when, first, the procedure is unduly suggestive and when, secondly, assuming an impermissibly suggestive display, its use, considering the "totality of the circumstances," is "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." *Neil* v. *Biggers*, 409 U.S. 188 (1972); *Simmons* v. *United States*, 390 U.S. 377 (1968); *United States* v. *Burse*, 531 F.2d 1151, 1155 (2d

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* Robert Buckhart, "Eyewitness Testimony" *Scientific American*. Vol. 231, No. 6, Dec. 1974, pp. 23-31.

Cir. 1976); *United States* v. *Tramunti*, 513 F.2d 1087, 1116 (2d Cir. 1975); *United States ex rel. John* v. *Cassles*, 489 F.2d 20, 23 (2d Cir. 1973), *cert. denied*, 416 U.S. 959 (1974); *United States ex rel. Phipps* v. *Follette*, 428 F.2d 912, 914-15 (2d Cir.), *cert. denied*, 400 U.S. 908 (1970). Among the factors to be considered are:

> "the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crimes and the confrontation." *Neil* v. *Biggers*, *supra* 409 U.S. at 199-200.

Applying these criteria to the challenged in-court identifications made by the various bank employees, there was plainly no substantial likelihood of irreparable misidentification.

The four bank employees had an excellent opportunity to observe the hold-up team, neither of whom was wearing a disguise. (App. 246, 773, 774; GX 2, 3). The banks in both instances were well lit; there were no obstructions. There was but a short distance between the male robber who was standing at the teller's counter and the three employees of Manufacturers Hanover Trust Company who were stationed in the same work area. (App. 46-47, 73 86-87, 107). Donna Morrison of the National Bank of North America actually handed over $1400 to the black male who held her up. (App. 558). Moreover, all four eye witnesses were staring at the male robber

for a matter of minutes.* The District Court made a finding that the observations by the eye witnesses lasted

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* Charlene Churilla testified at the hearing that she observed the hold-up team for "[b]etween three and four minutes." (App. 49). Her trial testimony is entirely consistent with this estimate. (App. 451, 479-81).

Celinda Rivera likewise stated that she had the pair under observation for three to four minutes. (App. 7[illegible]. At trial, after Judge Ward's denial of Green's motion to preclude any in-court identification, she testified that she could not recall exactly how long she was looking at the hold-up team, but that it was a matter of minutes rather than seconds. (App. 499). By a distorted reading of the trial record (App. 513-14, 534) Green asserts in his brief (Defendant Br. 7-8) that Miss Rivera only had a few seconds to observe the man and woman before they began to leave. In fact the record shows that the period of observation was a few minutes (App. 513) and that it was for a few seconds that she sat down to hit the alarm. (App. 534). It is noteworthy that Green's counsel did not renew his motion at trial to preclude the in-court identification by Miss Rivera after this supposed change in testimony.

Gene White estimated that he was watching the male and female involved in the attempted bank robbery for "maybe two, three minutes, not much longer than that." (App. 109).

Donna Morrison testified at the hearing that she was watching the gunmen, two feet across the counter from her, for "[l]ess than two minutes, a little more than a minute." (App. 246). She restated this estimate at trial. (App. 559). Contrary to the misleading suggestion in defendant's brief (pp. 12, 33) cross-examination did not establish that her attention was "riveted" on the gun to the exclusion of all else. Rather, the record simply reads:

> "Q. All together, how long were these two persons in front of you?
>
> A. Less than two minutes.
>
> Q. Was your attention riveted on the gun, would you say, *at any time during those two minutes?*
>
> A. Yes.
>
> Q. Was your attention riveted on the index card at any time?
>
> A. Just a little bit."

(App. 566) (emphasis supplied).

from one to four minutes. (App. 282). This was well within the period of time which this Court has in the past held to be sufficient to support a reliable identification. *Mysholowsky* v. *People of State of New York, supra*, 535 F.2d at 197 (armed robbery which lasted 38 seconds); *United States* v. *Yanishevsky*, 500 F.2d 1327 (2d Cir. 1974) (observer had only a "fleeting glance" of a "side face"); *United States* v. *Mims*, 481 F.2d 636 (2d Cir. 1973) (bank manager observed armed robber between ten seconds and one minute); *United States ex rel. Cummings* v. *Zelker*, 455 F.2d 714 (2d Cir. 1972) (burglary which lasted 15 seconds); *United States ex rel. Phipps* v. *Follette*, *supra* (intruder seen for 20 to 30 seconds while eye-witness still fighting off a second man).

As hold-up victims, Charlene Churilla and Donna Morrison were motivated to remember the gun-wielding assailant. In fact, they both had received training in identification procedures as part of their banks' security program. (App. 68, 260-61). Celinda Rivera's attention was firmly fixed on the male robber during the entire period that she was aware of the bank robbery. (App. 74-75). So too, Gene White had reason carefully to scrutinize the male robber, since it was he who had the gun and the gun was pointed in White's direction. (App. 108-09, 549-50).

When the FBI questioned the employees shortly after the events they were able to provide accurate descriptions, although height and weight figures varied to a degree. (App. 47, 76, 94-94, 116, 247, 250). Understandably, the witnesses attention was focused on head and facial features, since the teller's counter obstructed a full length view. Thus, it is not surprising that the Manufacturers Hanover Trust Company employees did not describe with precision the clothing worn by the male and female pictured in the surveillance photographs. (See Defendant Br. 33).

When the photographic spreads were shown, only Celinda Rivera hesitated to any degree in selecting the photograph of James Green. It took her less than five minutes. (App. 27-28) Charlene Churilla knew it was Green "from the beginning". (App. 51). Gene White testified that it took him "[p]robably around a minute, if that long" to select Green's photograph. (App. 112-13). Special Agent Roach estimated that it took White two or three minutes. (App. 28). Donna Morrison was able to identify Green in a matter of seconds according to Special Agent Cavanagh. (App. 230-231). Miss Morrison testified that it took less than a minute. (App. 248).

The photographic spreads were shown to the witnesses shortly after the events, nine days after the Manufacturers' attempted robbery and twenty-five days after the National Bank of North America robbery. More importantly, the trial in this case took place a little more than three months after the spree of bank robberies, a factor which argues against any undue reliance upon the showing of photographs. *United States* v. *Reid, supra*, 517 F.2d at 966.

Finally, there was ample additional evidence of the defendant's guilt to safely conclude that there was no misidentification here. *United States* v. *Reid, supra*, 517, F.2d at 967; *Haberstroh* v. *Montayne*, 493 F.2d 483, 485 (2d Cir. 1974); *United States ex rel. Gonzalez* v. *Zelker*, 477 F.2d 797, 803-04 (2d Cir.), *cert. denied sub nom. Gonzelez* v. *Vincent*, 414 U.S. 924 (1933). There were surveillance photographs showing Green and his wife stalking out of the Manufacturers Hanover Trust Company, evidence of a pattern of bank robberies committed by Mr. and Mrs. Green in the same manner, and their arrest in possession of a gun and a hold-up note. Only by wearing blinders can one conclude that a mis-

take has been made here in identifying Green as the male bank robber.*

POINT III

Green Was Not Entitled to a Judgment of Acquittal on Count Three.

At the conclusion of the Government's case and again after both sides rested, Green moved for a judgment of acquittal on Count Three under Federal Rule of Criminal Procedure 29 for failure of the Government to make out a prima facie case. The District Court denied the motion, finding that by direct and circumstantial evidence "all of the elements are present which would permit the jury to conclude that there was an attempted bank robbery." (App. 664-65). The thrust of Green's argument on appeal is that the victim teller, Lilly Yu, failed to make an identification of him at trial. This argument, more in the nature of a closing argument to the jury rather than a claim of legal error, is without merit.

There was ample evidence for the jury to conclude beyond a reasonable doubt that Green participated in the attempted robbery of the First National City Bank on March 5, 1976. Although Lilly Yu did not single out either defendant at trial, she had no difficulty in recalling the general identifying characteristics of the holdup pair. The male was identified as a young, black man, about five feet three inches or five feet five inches and weighing around 130 pounds. The female, she recalled, was a

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* It is also significant that the identifications were unshaken by cross-examination. See *United States* v. *Yanishefsky*, *supra*, 500 F.2d at 1330-31; *United States ex rel. Gonzalez* v. *Zelker*, *supra*, 477 F.2d at 803.

young black woman, about 20 years old, the same height as the male, and weighing around 110 pounds. (App. 428-29, 444-45).

Significantly, Miss Yu also testified that she almost immediately hit the alarm which had the double effect of activating the bank's camera surveillance system and sending the holdup pair quickly out of the bank. (App. 428, 434, 442). Not surprisingly the surveillance film, which was unloaded from the bank's cameras that very afternoon and later developed by the FBI, shows a young black couple fitting the description given by Miss Yu advancing from the tellers' area directly to the exit door. (GX 1A, 4, 5). GX 1A, a positive of one of the frames from the surveillance film, is a clear and unmistakable portrayal of the two defendants on trial, or so the jury could easily have concluded. And GX 4 and 5, the two rolls of film show the same young black couple emerging from the tellers' area and advancing to the door. This activity is recorded on the first few frames of the two rolls of film during the sequence after the alarm was hit. (App. 609-11). Earlier sequences of the two rolls of film show the bank to be empty, indicating that a test of the alarm and camera system was being conducted. (App. 601, 609-10). Cross-examination failed to develop the presence on the film of anyone else remotely fitting the description of the holdup team given by Miss Yu. (App. 598-600).

The jury thus had more than sufficient evidence, direct and circumstantial, to find the defendants guilty on Count Three. By comparing Green, who sat before them, with the surveillance photography, the jury could properly return a guilty verdict even without eyewitness testimony. *United States* v. *Fernandez*, *supra*, 456 F.2d at 642. In addition, the jury was entitled to consider Green's possession of a handgun at the time of his arrest

on March 12, 1976, only seven days after the aborted holdup at the First National City Bank, see Point 1, *supra*, as well as the fact that the person with whom Green is depicted leaving the bank was quite clearly his wife and co-defendant.

POINT IV

Green Has Waived Any Claim of Misjoinder. He Was Not Prejudiced by the Claimed Error.

For the first time on appeal Green asserts that he was prejudiced by misjoinded with his wife under Rule 8(b) of the Federal Rules of Criminal Procedure.* The failure prior to trial to request a severance constituted a waiver of this claim and, in any event, the claim lacks merit.

Since Green made no attempt to be relieved of the joinder with his wife, the initial hurdle which he must overcome is Rule 12 of the Federal Rules of Criminal

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* Rule 8 of the Federal Rules of Criminal Procedure deals with both joinder of offenses and defendants. It provides:

"(a) *Joinder of Offenses.* Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

(b) *Joinder of Defendants.* Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count."

Procedure. Rule 12(b)(2) provides that motions asserting defenses and objections based on defects in the indictment *must* be raised prior to trial. A claim of misjoinder is such a motion, 8 Moore, Federal Practice, ¶ 12.03[2], at 12-20 (2d Ed. 1976); *United States* v. *Papadakis*, 510 F.2d 287, 300 (2d Cir.), *cert. denied*, 421 U.S. 950 (1975); *Lelles* v. *United States*, 241 F.2d 21 (9th Cir.), *cert. denied*, 353 U.S. 974 (1957), and Rule 12(f) clearly provides that failure to make the motion in a timely manner "shall constitute waiver thereof."

Prior to trial, counsel for Green was fully aware that the superseding indictment alleged three bank robberies and that the Government intended to try him together with his wife. Yet he saw no reason to ask for a declaration of misjoinder, and he did not even seek a severance under Rule 14. Had he successfully taken either course, the Government could have opted to join all three bank robberies together, but to try the two defendants separately.* Green's failure to request such relief may well have been based on a strategic preference to be tried together with his wife, a more sympathetic co-defendant. Having opted, for whatever reason, not to seek a severance either under Rule 8(b) or Rule 14 it ill suits defendant to claim error now at this late date. As defendant virtually concedes (Defendant Br. 42), appellate review has been effectively foreclosed. See *United States* v. *Payden*, 536 F.2d 541,

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* This is so, because Rule 8(a) of the Federal Rules of Criminal Procedure, which governs the joinder of offenses, permits the Government to join offenses of "the same or similar character," in trials of a single defendant. Plainly the three bank robberies were offenses of the "same or similar character."

The other option open to the Government, of course, would have been to try each bank robbery separately in joint trials of the two defendants.

543 (2d Cir. 1976); *United States* v. *Goldberg*, 527 F.2d 165, 173 (2d Cir. 1975); *United States* v. *Papadakis*, *supra*, 510 F.2d at 320.

Furthermore, under the facts of this case, there was no error in allowing both defendants to be joined in a trial of all three bank robberies. There was ample basis for a conclusion that the two defendants were "alleged to have "participated . . . in the same series of acts or transactions constituting an offense or offenses." Fed. R. Crim. P. 8(b). The three bank robberies were executed in the same manner over a short period of time; the participants and their respective roles were always the same; and the banks were located in a fairly circumscribed area in midtown Manhattan.* The defendants' operations had all the earmarks of a common scheme or plan and therefore were properly tried together in a joint trial of the two defendants. See *United States* v. *Scott*, 413 F.2d 932, 934-35 (7th Cir. 1969); *Johnston* v. *United States*, 260 F.2d 345 (10th Cir. 1958); *United States* v. *Gilbar Pharmacy, Inc.*, 221 F. Supp. 160, 163 (S.D.N.Y. 1963) (Feinberg, J.); *Cf. United States* v. *DiGiovanni*, Dkt. No. 76-1097, slip op. 437, 449 (2d Cir., Nov. 9, 1976).*

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* Green's assertion that Professor Moore's hypothetical example of misjoinder (quoted at pages 39-40 of his Brief) squarely fits the facts of this case is patently in error. The hypothetical states that the second bank robbery took place "at a substantial time later." 8 Moore, Federal Practice ¶ 8.06, at 8-25 (2d ed. 1976). Here the defendants were staging a continuous series of bank robberies, with only a brief passage of time between each robbery.

* The Government could easily have charged and proven a conspiracy by the defendants to commit bank robbery over a three week period in violation of Title 18 U.S. Code, Sections 371 and 2113(a). If it had done so there would be no question but

[Footnote continued on following page]

Finally, even if Green had not waived the claim and were correct that the joinder with his wife violated Rule 8(b), he has failed to demonstrate any prejudice, let alone the "substantial prejudice" required to obtain a reversal of his conviction. See *United States* v. *Papadakis*, *supra*, 510 F.2d at 300. Under Rule 8(a), there can be no question but that the Government could have conducted a separate trial of Green in which all three bank robbery charges were joined. Yet even a cursory reading of Green's brief reveals that all of his claims of prejudice relate to the joinder of the bank robbery offenses, not the joinder with his co-defendant. (Defendant Br. at 41).*

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that joinder would be proper. *Schaffer* v. *United States*, 362 U.S. 511 (1960). The mere absence of a conspiracy count in the indictment where the evidence at trial proved that a conspiracy between Green and his wife clearly existed and where no timely motion under 8(b) was ever made should not cause a different result. *United States* v. *Scott*, *supra*; *Cf. United States* v. *Granello*, *supra*, 365 F.2d 990, 995 (2d Cir. 1966), *cert. denied*, 386 U.S. 1019 (1967).

* Even if the Government had elected to proceed to trial on the initial indictment alleging but one bank robbery, evidence of the other bank robberies could have been offered against Green as similar acts. See *United States* v. *Payden*, *supra*, 536 F.2d at 543; *United States* v. *Papadakis*, *supra*, 510 F.2d at 294-95; *United States* v. *Torres*, 519 F.2d 723 (2d Cir. 1975).

AFFIDAVIT OF MAILING

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

T. GORMAN REILLY being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 30TH day of DECEMBER, 1976, he served 2 copies of the within brief by placing the same in a properly postpaid franked envelope addressed:

GUY MILLER STRUVE
1 CHASE MANHATTAN PLAZA
NEW YORK, N.Y. 10005

And deponent further says that he sealed the said envelope and placed the same in the mail box for mailing at One St. Andrew's Plaza, Borough of Manhattan, City of New York.

T. Gorman Reilly

Sworn to before me this

30TH day of December 1976

Alma Hanson

ALMA HANSON
NOTARY PUBLIC, State of New York
No. 24-6763450 Qualified in Kings Co.
Commission Expires March 30, 1978